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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 728

MIDWEST HAULERS, INC., MUTUAL TRUCKING COMPANY, CARRIERS EQUIPMENT COMPANY, HAYDEN TRUCK LINES, INC.,

Appellants,

vs.

C. EMORY GLANDER, Tax Commissioner of Ohio

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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Counsel for Appellee.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Discussion of issues decided in the Supreme Court of Ohio	2
Errors assigned by appellants before the Supreme Court of Ohio	4
Conclusion	6
Motion to dismiss	7

Table of Cases Cited

Eustis v. *Bolles*, 150 U. S. 361	6
Fyr-Fyter v. *Glander*, 150 O. S. 118	4
Honeyman v. *Hanan*, 302 U. S. 375	6
Jett Brothers Distilling Co. v. *City of Carrollton*, 252 U. S. 1	6
Memphis Natural Gas Co. v. *Beeler*, 315 U. S. 649	6
Stadelman v. *Miner*, 246 U. S. 544	6
Zucht v. *King*, 260 U. S. 174	6

Statutes Cited

Judicial Code, Section 237(a) (28 U.S.C. 344a)	1
Ohio General Code:	
Section 5546-1	2, 4
Section 5546-2	2
Section 5546-25	2, 4
Section 5546-26	3

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Appellants,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO,

Appellee

STATEMENT BY APPELLEE OF GROUNDS IN OPPOSITION TO APPELLATE JURISDICTION OF ABOVE COURT, PURSUANT TO SUPREME COURT RULE 12.

The appellee states the following matters and grounds against the jurisdiction of this Court as asserted by the appellants herein, in their statement of the basis of the appellate jurisdiction, filed herein on the 7th day of March, 1949, as required by Rule 12 of the Supreme Court.

The statute relied on by appellants herein to sustain the appellate jurisdiction of this Court, *i.e.*, Section 237, Paragraph (a) of the Judicial Code, 28 U. S. C. 344(a), is not applicable to this case for the reason that the validity of

statutes of the State of Ohio was not drawn into question in the Supreme Court of Ohio, the court from which this alleged appeal is taken.

Discussion of Issues Decided in the Supreme Court of Ohio

Four issues were determined by the Supreme Court of Ohio in arriving at its judgment in this case.

1. It held that "only such sales as are made within the State are taxed and not those sales outside its borders."

2. It held that the Board of Tax Appeals had not acted unreasonably or unlawfully in determining that Midwest and Mutual were not rendering a public utility service prior to November 5, 1940, and that, subsequent to that time they were rendering such a service.

3. It held that the Board of Tax Appeals had not acted unreasonably or unlawfully in determining that the sale and use of certain items of tangible personal property were not excluded from taxability by the language of Sections 5546-1 and 5546-25, Ohio General Code.

4. It held that the evidence supported the finding of the Board of Tax Appeals that Carriers and Hayden Truck Lines, Inc. were agents of Midwest and Mutual and that the taxes were properly assessed against all appellants jointly.

With respect to issue No. 1, the statute, Section 5546-2, reads as follows:

"• • •

"The tax hereby levied does not apply to the following sales:

"• • •

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"8. Sales which are not within the taxing power of this State under the Constitution of the United States."

and Section 5546-26 reads in part as follows:

"The tax hereby levied does not apply to the storage, use, or consumption in this State of the following described tangible personal property, nor to the storage, use, or consumption in this State of tangible personal property purchased under the following described cricumstances:

" • • •

"2. Property, the storage, use, or other consumption of which this State is prohibited from taxing under the Constitution, or laws of the United States, or under the Constitution of this State. This exemption shall not exempt from the application of the tax herein imposed the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this State, provided that fuel to be used or transported in carrying on interstate commerce which is stopped within this State pending transfer from one conveyance to another shall be exempt from the excise tax imposed by this act and section 5546-2 of the General Code of Ohio."

The question before the Supreme Court of Ohio, then, was whether or not the Constitution or laws of the United States forbade the taxes which were assessed. The Court held that they were not so forbidden. Since the statute did not purport to tax where so forbidden, it is obvious that the validity of the State statutes was not and could not have been ruled upon.

Issue No. 2 arose by reason of the language of the statutes which exempted from sales and use taxes property used "directly in the rendition of a public utility service."

Sections 5546-1 and 5546-25, Ohio General Code. This was purely a question of whether or not the activities of appellants fell within the exempting clause. No contention has ever been made by appellants that the exempting clause was unconstitutional.

Issue No. 3 involved the interpretation of the word "directly" as used in the statutes referred to in the preceding paragraph. No contention has ever been made by appellants that the interpretation, adopted in *Fyr-Fyter* v. *Glander,* 150 O. S. 118, and followed here, made the exempting clause unconstitutional.

Issue No. 4 did not involve statutes in any way.

Errors Assigned by Appellants Before the Supreme Court of Ohio

In appealing from the Board of Tax Appeals to the Supreme Court of Ohio the appellants urged the following constitutional errors:

"• • •

"(10) In failing to find that the property so purchased and sold was used in interstate commerce and was not within the taxing power of the state of Ohio under the Constitution of the United States.

"(11) In applying the provisions of Section 5546-2, providing that

"'It shall be presumed that all sales made in this state are subject to the tax hereby levied, until the contrary is established.'

whereby, in so doing, notwithstanding evidence to the contrary, the Tax Commissioner and the Board of Tax Appeals denied to the appellants, and each of them, the constitutional rights guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

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"(12) In applying the provisions of Section 5546-26, providing that

"'It shall be presumed that tangible personal property purchased on or after January 1, 1936, by any person for delivery in this state is purchased for storage, use or other consumption in this state.'

whereby, in so doing, notwithstanding evidence to the contrary, the Tax Commissioner and the Board of Tax Appeals denied to the appellants, and each of them, the constitutional rights guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

"(13) The aforesaid quoted portions of Sections 5546-2 and 5546-26 are in contravention of the Fourteenth Amendment to the Constitution of the United States, and void."

Assignment No. 10 was considered by the Supreme Court of Ohio. This became the first issue decided which, as shown above, did not involve statutory validity as against a charge of unconstitutionality.

Assignments Nos. 11 and 12 show on their face that no substantial claim of statutory invalidity was asserted. The matter complained of was the error of the Board of Tax Appeals in disregarding the evidence.

Assignment No. 13 is the only contention made by appellants that statutes of the State of Ohio are constitutionally invalid, but it is really nothing more than a restatement of assignments Nos. 11 and 12 and is not substantial. Such statutory provision is a necessary administrative presumption. The appellants' complaint is as to its application in the light of the evidence and not as to its validity. The Supreme Court of Ohio was not required to pass upon such an imaginative assignment in order to dispose of the case properly.

Conclusion

The appellants concede that the ground for appeal is not based upon the validity of statutes of the State of Ohio but is rather based upon the administrative actions of the Tax Commissioner. In their typewritten jurisdictional statement they say (page 13):

> "The taxes assessed by the state of Ohio are violative of the commerce clause of the constitution."

and again, referring to "due process,"

> "The judgment is contrary to the indisputed facts."

Thus, no ground for appeal under 28 U. S. C. 344(a) is set forth by appellants.

In support of this contention the appellee cites the following cases:

Eustis v. *Bolles*, 150 U. S. 361;

Stadelman v. *Miner*, 246, U. S. 544;

Jett Brothers Distilling Company v. *City of Carrollton*, 252 U. S. 1;

Zucht v. *King*, 260 U. S. 174;

Honeyman v. *Hanan*, 302 U. S. 375;

Memphis Natural Gas Compauy v. *Beeler*, 315 U. S. 649.

Respectfully submitted,

HERBERT S. DUFFY,
Attorney General

W. H. ANNAT,
Assistant Attorney General,
Attorneys for Appellee.

Dated this 17th day of March, 1949.

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Appellee.

MOTION TO DISMISS PURSUANT TO RULE 12, PARAGRAPH 3, RULES OF THE SUPREME COURT

Comes now S. Emory Glander, Tax Commissioner of Ohio, appellee herein, and moves this honorable court to dismiss the appellants' alleged appeal herein for the reason that the validity of statutes of the State of Ohio was not drawn into question in the Supreme Court of Ohio, the court from which this alleged appeal is taken.

HERBERT S. DUFFY,
Attorney General
W. H. ANNAT,
Assistant Attorney General,
Attorneys for Appellee.

Dated this 17th day of March, 1949.